93-691

SUPREME COURT, U.S.
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No. _____

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1993

IN THE MATTER OF THE ESTATE OF:
NELLIE MAY WILSON, DECEASED
*ERMA JEAN PHIPPS, Petitioner*

*v.*

ROBERTA K. WILSON, EXECUTRIX OF THE ALLEGED LAST WILL AND TESTAMENT OF THE DECEASED, NELLIE MAY WILSON;
*and ROBERTA K. WILSON, Respondent*

## PETITION FOR WRIT OF CERTIORARI

Daniel S. Davisson
DAVISSON & DAVISSON, P.C.
1111 Meridian Plaza
Anderson, Indiana 46016
(317) 643-6657

Counsel of Record

David W. Stone IV
STONE Law Office & Legal Research
26 W. 8th Street., P.O. Box 1322
Anderson, Indiana 46015
(317) 644-0331

Attorneys for Petitioner

## Question Presented for Review

Do the provisions of the Indiana Probate Code violate the due process clause of Fourteenth Amendment to the United States Constitution by not requiring that a person who would inherit if a decedent died intestate be given notice of the probate of a will which disinherits such person?

**List of Parties in the Proceedings in the Court Below**

Erma Jean Phipps is the petitioner here and was the petitioner in the trial court and the appellant in the state appellate proceedings.

Roberta K. Wilson was a respondent in the trial court proceedings and an appellee in the state appellate proceedings both as executrix of the last will and testament of the deceased Nellie May Wilson and as an individual.

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## Opinions Below

The decision of the Circuit Court of Madison County, Indiana, dismissing the will contest was entered June 15, 1992.

The judgment of the Court of Appeals of Indiana was entered March 10, 1993. The opinion is reported as *Matter of Estate of Wilson*, 610 N.E.2d 851-8 (Ind.App., 1993).

The petition for rehearing was denied by the Court of Appeals of Indiana without opinion on May 17, 1993.

The Petition to Transfer to the Supreme Court of Indiana was denied without opinion on August 2, 1993.

## Statement of Jurisdiction

The Supreme Court of Indiana denied a petition to transfer on August 2, 1993. This petition for certiorari was filed less than 90 days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## Constitutional Provisions, Treaties, Statutes, Rules and Regulations

The relevant portion of the 14th Amendment to the United States Constitution says in part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

Indiana Code § 29-1-7-4 states:

> Any interested person or a personal representative named in the will may petition the court having jurisdiction of the administration of the decedent's estate:
>
> (a) To have the will of such decedent, whether the same is written or is unwritten, is in his possession or not, is lost, destroyed, or without the state, probated;
>
> (b) For the issuance of letters testamentary to the executor named in said will for the administration of said estate;

(c) For the appointment of an administrator with the will annexed is no executor is designated in said will or if the person so designated with not qualified, dead or refuses to serve;

(d) For the appointment of an administrator of the estate of any person dying intestate.

A petition for probate may be combined with a petition for the issuance of letters testamentary, or as administrator with the will annexed, and a person interested in the probate of a will and in the administration of the estate may petition for both.

No notice that a will is to be offered for probate or that it has been probated shall be required.

No notice of the filing of, and hearing on, the petition described in this section shall be given to, or served, upon any person. If the petition described herein is filed in term time, it shall be heard forthwith by the court, and if filed in vacation it shall be heard by the judge of said court if present, or in his absence by the clerk of the said court.

Indiana Code § 29-1-7-7 states:

**Notice of appointment of personal representative—Creditors to file claims—Form of notice.**— (a) As soon as letters testamentary or of administration, general or special, supervised or unsupervised, have been issued, the clerk of the court shall publish notice of the estate administration.

(b) The notice required under subsection (a) shall be published in a newspaper of general circulation, printed in the English language and published the county where the court is located, once each week for two (2) consecutive weeks. A copy of the notice, with proof of publication, shall be filed with the clerk of the court as a part of the administration of the estate within thirty (30) days after the publication. If no newspaper is published in the county, the notice shall be published in a newspaper published in an adjacent county.

(c) The notice required under subsection (a) shall be served by mail on each heir, devisee, legatee and known credi-

tor whose name and address is set forth in the petition for probate or letters. The personal representative shall furnish sufficient copies of the notice, prepared for mailing, and the clerk of the court shall mail the notice upon the issuance of letters.

(d) The personal representative or the personal representative's agent shall serve notice on each creditor of the decedent:

(1) Whose name is not set forth in the petition for probate or letters under subsection (c);
(2) Who is known or reasonably ascertainable within three (3) months after the first publication of notice under subsection (a); and
(3) Whose claim has not been paid or settled by the personal representative.

The notice may be served by mail or any other means reasonably calculated to ensure actual receipt of the notice by a creditor.

(e) Notice under subsection (d) shall be served within three (3) months after the first publication of notice under subsection (a) or as soon as possible after the elapse of three (3) months. If the personal representative or the personal representative's agent fails to give notice to a known or reasonably ascertainable creditor of the decedent under subsection (d) within three (3) months after the first publication of notice under subsection (a), the period during which the creditor may submit a claim against the estate includes the period specified under IC 29-1-14-1 and an additional period ending two (2) months after the date notice is given to the creditor under subsection (d). However, a claim subject to this subsection may not be filed more than one (1) year after the death of the decedent.

(f) A schedule of creditors that received notice under subsection (d) shall be delivered to the clerk of the court as soon as possible after notice is given.

(g) The giving of notice to a creditor or the listing of a creditor on the schedule delivered to the clerk of the court does

not constitute an admission by the personal representative that the creditor has an allowable claim against the estate.

(h) If any person entitled to receive notice under this section is under a legal disability, notice may be served upon or waived by the person's natural or legal guardian or by the person who has care and custody of the person.

(i) The notice shall read substantially as follows:

NOTICE OF ADMINISTRATION

In the _____ Court of _____ County, Indiana.

Notice is hereby given that _____ was on the ____ day of _____, 19__, appointed personal representative of the estate of _____ deceased.

All persons having claims against said estate, whether or not now due, must file the same in said court within five (5) months from the date of the first publication of this notice or said claims will be forever barred.

Dated at _____, Indiana, this ____ day of _____, 19__.

_____

CLERK OF THE _____ COURT
FOR _____ COUNTY, INDIANA

Indiana Code § 29-1-7-17 states:

**Action to contest will—Limitation—Complaint—Parties.**—Any interested person may contest the validity of any will in the court having jurisdiction over the probate of the will within five (5) months after the date of the order admitting the will to probate by filing in the court the person's allegation in writing verified by affidavit, setting forth:

(1) The unsoundness of mind of the testator;

(2) The undue execution of the will'

(3) That the will was executed under duress or was obtained by fraud; or

(4) Any other valid objection to the will's validity or the probate of the will.

The executor and all persons beneficially interested in the will shall be made defendants to the action.

**Statement of the Case**

In 1990, Nellie Wilson was found by local police in a confused and wandering state. She was 79 years old. On March 13, 1990, a petition for the appointment of a guardian over her was filed by an investigator for the Adult Protective Services of Region One, State of Indiana. The petition was supported by a physician who had examined her and found her to be suffering from periods of confusion and short term memory.

Notice of the guardianship proceedings was given to the petitioner and to Roberta K. Wilson whose counsel entered his appearance on her behalf and on behalf of Nellie Wilson on March 27, 1990.

On March 16, 1990, Nellie Wilson signed a will which gave all her property to Roberta Wilson who was a niece by marriage and ineligible to inherit by intestate secession, and named her as Executrix of her estate. Erma Phipps was the niece and nearest blood relation of Nellie Wilson and would have taken her estate under the laws of intestate secession under the laws of the state of Indiana.

The will was prepared and witnessed by the same attorney who appeared in the guardianship proceedings on behalf of Roberta Wilson and who represented Roberta Wilson as Executrix in these proceedings.

Nellie Wilson died December 6, 1990. Her will was admitted to probate on December 11, 1990.

Roberta Wilson and her attorney knew of the existence of Erma Phipps and her location.

Erma Phipps was hospitalized for many weeks after the death of her aunt. Following her hospitalization and a partial recovery she attempted to contact her aunt and then learned of her aunt's death

for the first time in approximately December of 1991. On December 27, 1991, while the estate was still open but after the time period had run under Indiana law for the filing of an action to contest a will the petitioner filed a will contest. The Estate on January 24, 1992, filed a motion to dismiss the will contest on the ground it was untimely.

The challenge to the constitutionality of the probate law of Indiana permitting a will to be probated that disinherits the person who would otherwise take the estate of the decedent if such decedent had died intestate without notice to such heir was raised on March 5, 1992, in Petitioner's response to the motion to dismiss the will contest. The state trial court rejected the petitioner's claim that the lack of notice denied her due process of law and ordered the dismissal of the will contest on June 15, 1992.

On the direct appeal to the Court of Appeals of Indiana, the petitioner again argued that the state statutes denied her due process of law by not affording her personal notice of the probate of the will which disinherited her. The Court of Appeals of Indiana also rejected the argument. The same argument was raised in the Indiana Supreme Court which declined to review the case.

## Reasons for Granting Writ

This case presents an opportunity for this Court to resolve the conflict that has arisen among the states as to the character of the right or interest to take property under the laws of intestate secession and whether due process requires that a person whose existence and address are known and who, but for the probate of a will, would take an estate, is entitled to receive notice of such probate of the will so that she is afforded an opportunity to contest it.

The Court of Appeals of Indiana concluded that the petitioner was not entitled to receive notice of the probate of the will because her interest as an heir was a "mere expectancy" and as such did not qualify as property for purposes of due process protection. *Matter of Estate of Wilson*, 610 N.E.2d 851, 858 (Ind.App., 1993).

To say, as the Court of Appeals of Indiana did, that there is no right entitled to due process protection, i.e. notice of a proceeding, unless the action which would be triggered by the notice is taken even in the absence of notice is no different than the position taken by the estate which was rejected by this Court in *Tulsa Collection*

*Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). There a creditor who did not file a claim against an estate within the statutory time period and who was not given personal notice of the fact that an estate had been opened was told by the state courts it was not denied due process when they held the claim was barred under the state statute which was a self-executing non-claim statute which did not require actual notice. This Court disagreed and held that the cause of action against the estate for an unpaid bill, while an intangible interest, was property protected by the Fourteenth Amendment. It was further held that due process required that readily identified creditors be given actual notice in order to have a chance to assert their claims. The cause of action of the petitioner in this case to contest the will was no less a protected property interest. She was stripped of that property interest without any notice of the pending proceedings. The Court of Appeals of Indiana justified this action on the ground she had no property interest entitled to due process notice protection due to her failure to file a will contest within the statutory time limits. The similarity of such reasoning to a dog chasing its tail is readily apparent. She was denied due process of law.

The Iowa Supreme Court has considered the same question which was decided by the Court of Appeals of Indiana and reached the opposite conclusion in *Matter of Estate of Weidman*, 476 N.W.2d 357 (Iowa, 1991). The Iowa probate statute only required notice by publication of the probate of a will. An heir argued that this denied him due process of law and that his right to contest the will could not be extinguished merely by notice by publication. The Iowa Supreme Court agreed holding that although in *Tulsa Collection Services, Inc. v. Pope*, *supra*, this Court did not extend its ruling beyond creditors of an estate, the rationale for this determination, however, should also apply to other interested parties, especially parties whose rights may be precluded by published notice. This case presents an excellent opportunity for this Court to resolve the question of whether a person who would take an intestate estate is entitled to notice of the probating of a will that changes such result under the due process clause or if such interest may be cut off after only service by publication to creditors of the probating of the will.

The petitioner submits that the reasoning of the Iowa Supreme Court is far more persuasive than the opinion by the Court of Ap-

peals of Indiana and is much more in harmony with past decisions of this Court.

Semantic labeling such as engaged in by the Court of Appeals of Indiana in an effort to justify not providing notice on the ground something is not a right as opposed to being a privilege has consistently been rejected by this Court. *Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S.Ct. 1011, 25 L.Ed.2d 287, 295-6 (1970); *Perry v. Sindermann*, 408 U.S. 593, 602, 92 S.Ct. 2694, 33 L.E.2d 570, 580 (1972); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402, 86 S.Ct. 518, 15 L.Ed.2d 447, 450 (1966). The Indiana statutes which provided for intestate inheritance gave Mrs. Phipps a claim of entitlement to inherit unless she was disinherited by a valid will.

Property includes the right to acquire it. *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); *Holden v. Hardy*, 169 U.S. 366, 391, 18 S.Ct. 383, 42 L.Ed. 780, 790 (1898). The right to acquire property through inheritance and to protect such right of inheritance by being able to contest an invalid will would properly fall without the scope of such classification of property and should be held entitled to the most fundamental due process protection, notice reasonably calculated to reach her, before she could lose the right to contest the will. The petitioner was given no notice. The only notice was a published notice to the creditors of the deceased and as to Petitioner it would be no more than a gesture. I.C. § 29-1-7-7. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314-5, 70 S.Ct. 652, 94 L.Ed. 865, 873-4 (1950).

The concept of property includes intangible things. *Fidelity & Deposit Co. of Maryland v. Arenz*, 290 U.S. 66, 68, 54 S.Ct. 16, 78 L.Ed. 176, 178 (1933). It includes things terminable at will such as a right of occupancy under a tenancy at will. *Dickman v. Commissioner of Internal Revenue*, 465 U.S. 330, 336-7, 104 S.Ct. 1086, 79 L.Ed.2d 343, 350 (1984). The right to contest a will which could result in the right to receive the estate of the deceased falls within the scope of the concept of being property. The petitioner was deprived of that right without any notice of the pendency of the estate.

It has often been held by this Court and other courts throughout the nation that causes of actions do constitute a property right. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-9, 102 S.Ct. 1148, 71 L.Ed.2d 265, 273 (1982). It has also been held that the

right of access to the courts of a potential litigant is also of constitutional magnitude. *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

In this case, Mrs. Phipps was deprived of all right to challenge the execution of the will which deprived her of the inheritance she would otherwise have received. She was cut off from any opportunity to challenge the conduct of the executrix who was the sole beneficiary under such will in obtaining its execution. It cannot seriously be maintained that her right to litigate such a claim does not constitute a property right for due process purposes.

In this case no notice was given to Mrs. Phipps. Indiana law expressly states that no notice is required. I.C. § 29-1-7-7. The only "notice" given to Mrs. Phipps was newspaper publication of notice to creditors. This Court has noted that publication has historically been the means of notice used when the person giving notice does not really want to bring the matter to the attention of those who are affected by the action he wishes to take. *Mullane v. Central Hanover Bank and Trust Co., supra*. Due process considerations cannot be measured in terms of dollars or hours of delay. *Taylor v. Hayes*, 418 U.S. 488, 500, 94 S.Ct. 2967, 41 L.Ed.2d 897, 908 (1974). Here the address of Mrs. Phipps was know to the personal representative and her attorney. The cost of giving personal notice to her as opposed to only notice by publication would have been no more than that of a postage stamp.

A person who is a beneficiary under a will and is the personal representative has no incentive to see that persons who are disinherited by such will are notified of its probate. In fact they have an incentive to do the minimum necessary in the hope that such disinherited heirs will not discover the probate of the will in time to assert any infirmities with respect to the execution of such will just as a personal representative who also takes by intestate secession has an interest to conceal the existence of other heirs entitled to a share of the estate. Cf. *Altshuler v. Minkus-Whalen*, 31 Mass.App.Ct. 937, 579 N.E.2d 1369 (1991); *Smith v. Estate of King*, 579 So.2d 1250 (Miss., 1991); *Succession of Hearn*, 412 So.2d 692 (La.App., 1982); *Morris v. Mull*, 110 Ohio St. 623, 144 N.E. 436 (1924). The attitude of the executrix and beneficiary was clearly stated in her brief to the Court of Appeals of Indiana when she said that: "Roberta Wilson did everything that was required of

her and gave all of the notices which were required by Indiana law." (Appellee's brief p. 13 to the Court of Appeals of Indiana).

Other states have recognized by legislation that due process requires actual notice to heirs so that they have a real opportunity to contest wills that disinherit them. *In Matter Estate of Lawver*, 86 Or.App. 711, 740 P.2d 1215, 1219 (1987). It has also been held that an heir has more of a due process right to actual notification of the probate of a will that cuts off his right of inheritance than a creditor would have to notice of the opening of the estate. *Gano Farms, Inc. v. Estate of Kleweno*, 2 Kan.App.2d 506, 582 P.2d 742, 745 (1978). The Georgia Supreme has held that in order to comply with due process, a probate statute had to be construed so as to require that beneficiaries under a prior will which was revoked by a later will were entitled to notice so they would be able to contest the later will. *Garner v. Harrison*, 260 Ga. 866, 400 S.E.2d 925, 926-7 (1991).

This Court has held that principles of contract law serve as useful guides in determining if a constitutionally protected property interest exists. *Jago v. Van Curen*, 454 U.S. 14, 18, 102 S.Ct. 31, 70 L.Ed.2d 13, 17-8 (1981). A prospective right of inheritance may be the subject of contract and transferred by an assignment and at least in equity, the agreement will be enforced. Jaeger, *Williston on Contracts (3rd ed.)* § 1681A at page 701.

The interest of an heir as next of kin has been characterized as a property right and as a chose in action. *Reardon v. Whalen*, 306 Mass. 579, 29 N.E.2d 23 (1940). The ability to contest a will has been held to be a legally protected interest and entitled to constitutional protection. *Palazzi v. Estate of Gardner*, 32 Ohio St.3d 169, 512 N.E.2d 971 (1987). The interest of the Petitioner in her relative's estate may not be stripped of due process protection by the expediency of labeling it as an expectancy. The protection of due process does not depend upon the type of property which is involved. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 608, 95 S.Ct. 719, 42 L.Ed.2d 751, 758 (1975). Property and liberty interests are expansive and not frozen in time for purposes of due process protection. *Board of Regents of State College v. Roth*, 408 U.S. 564, 571-2, 92 S.Ct. 2701, 33 L.Ed.2d 548, 557 (1972). Permitting the right to contest a will to be lost where there has merely been notice by publication of the probate of the will because such interest is labeled a mere expectancy results in the

fossilization of the concept of what constitutes property and prevents growth to accommodate the realties of life.

The fact that the Indiana Probate Code does not require notice of the probate of a will to those who would have inherited if the deceased died intestate does not mean that due process is satisfied. As already covered, the right to contest a will is a species of property for purposes of due process protection. Although well known to the executrix, no notice was given to Mrs. Phipps, the person who would inherit the substantial estate, approximately one-half million dollars, except for the probate of a will of questionable validity. The only notice afforded being the obscure notice to creditors by publication.

As stated above it is no answer to say that the Indiana statute only required notice by publication and therefore due process is satisfied. The contents of state statutes are not determinative of what is required by due process. *Hebert v. Louisiana*, 272 U.S. 312, 47 S.Ct. 103, 71 L.Ed. 270 (1926). In *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798-800, 103 S.Ct. 2706, 77 L.Ed.2d 180, 187-8 (1983) posted notice and notice by publication was the only notice required by the Indiana statute to be given to mortgagees. Nonetheless it was held that there was a denial of due process despite compliance with the requirements of the state statute which permitted less reliable forms of notice which were not reasonable in light of the inexpensive and more reliable alternatives such as mail service that were available. The same conclusion is required here. Notice only by publication to creditors did not satisfy due process regardless of the requirements of the state statutes. To the extent that the state statute permitted such published notice to be sufficient to cut off the right to contest a will, it should be held unconstitutional as a denial of due process of law.

The theory that the Indiana probate code which does not require notice to disinherited heirs is a denial of due process has been commented upon by Professor Debra A. Falender. An earlier work by her, *Notice to Creditors in Estate Proceedings: What Notice is Due?*, 63 N.C.L.Rev. 659 (1983) was cited by this Court repeatedly in *Tulsa Collection Services, Inc. v. Pope*, *supra*. She is also the author of *Henry's Indiana Probate Law and Practice* (8th ed.). In volume 1 of that treatise in § 307, she states:

In another situation, not expressly addressed by *Pope*, Indiana's absence of notice provision appears equally inadequate. Under I.C. 29-1-7-4, upon the probate of a will or the filing of a petition seeking probate of a will, no notice at all is to be given to heirs or to devisees under prior wills. If the *Mullane-Pope* notice standard is applicable in probate proceedings, it would seem that known or ascertainable heirs, who would be disinherited by that will, should be notified "by mail or other means as certain to ensure actual notice." The probate of the will is a judicial proceeding that will deprive the heirs of an interest in the decedent's estate if, in fact, the will was invalid and the heirs do not contest the probate within the statutory time. If the heirs or other interested parties, fail to initiate a contest with the contest period, their ability to contest is forever barred. The will contest period operates much like a creditor non-claim provision. It has attributes of a statute of repose or limitations, but it is not a self-executing statute of limitations. It is instead a time period initiated by the court's adjudication of the validity of a will, which should be sufficient state action to trigger the fourteenth amendment's due process requirements. Persons such as known or reasonably ascertainable heirs, whose property interests are affected by that court adjudication should be given notice, just as creditors whose property interests are affected by the opening of administration of a decedent's estate must be given notice of the proceeding that affects their rights. 1 *Henry's Indiana Probate Law and Practice* at 121-2.

The reasoning of Professor Falender is much sounder than that of the opinion at issue here.

The opinion by the Indiana Court of Appeals says that:

The interest vests, if at all, at death, (citation omitted), depending on whether, under the laws of this state, the person is entitled to a share in the estate. As already discussed, Phipps is not entitled to a share in the estate under Indiana law, therefore, she has no protected property interests for the purpose of her due process claim. 610 N.E.2d at 858.

It is respectfully submitted that this statement is circular and begs the question. The only reason that Mrs. Phipps did not have a right to share in the estate was because she did not receive notice of the probate of the will so as to be enabled to file a timely will contest. The opinion's statement is akin to telling a mortgage holder on property that was sold at tax sale that he has no right to complain that he was not notified of the sale when the time to redeem or protect such property has run because by then he had no property interest left to protect. Mrs. Phipps was the next of kin of the deceased. As such, she would inherit from the estate over $400,000 if the deceased died intestate. I.C. 29-1-2-1; *Todd v. Ehresman*, 132 Ind.App. 440, 175 N.E.2d 425 (1965).

A holding that actual notice to such a known person is required by due process eliminates or at least greatly reduces the possibilities of a person being able to profit from a will executed at his request by a person of unsound mind. The petitioner in this case wished to contest the will on the ground that the decedent lacked mental capacity and was subjected to undue influence. The executrix was the sole devisee under the will. The interest of the executrix in keeping the probating of the will from the appellant is apparent.

The burden of requiring actual notice to known persons who are cut off by a will from the inheritance they would have received had the decedent died intestate is not a heavy one. Section 3-705 of the Uniform Probate Code imposes such a requirement. 8 U.L.A. 321-2. That code has been adopted by at least 15 states. 8 U.L.A. 1993 supp. p. 1. This Court has concluded that it is not an unreasonable burden to require a search to be made for creditors of a deceased to collect in order to give the creditors of the deceased the notice required by due process before they loose their causes of action to seek payment. *Tulsa Collection Services, Inc. v. Pope*, *supra*. It would be much easier in the vast majority of cases to locate the next of kin of a deceased who would take under intestate secession than it is to locate all creditors. Yet the Court of Appeals of Indiana found that it was proper to deny such next of kin notice of the existence of a will which disinherits them so that they could have an opportunity to contest the will and preserve their right of inheritance. The decision that there was no denial of due process should not be allowed to stand.

## Conclusion

The Court should find that to the extent Indiana Code §§ 29-1-7-4, 7 and 17 dispense with the requirement that notice be given to the person who would inherit under intestate succession of the probate of a will are unconstitutional as a denial of due process of law.

Respectfully submitted,

Daniel S. Davisson
DAVISSON & DAVISSON, P.C.
1111 Meridian Plaza
Anderson, Indiana 46016
(317) 643-6657

David W. Stone IV
STONE Law Office & Legal Research
26 W. 8th Street., P.O. Box 1322
Anderson, Indiana 46015
(317) 644-0331

Attorneys for Petitioner

STATE OF INDIANA
SS:
COUNTY OF MADISON

IN THE MADISON CIRCUIT COURT

TERM: 1992

CAUSE NO. 48C01-9012-ES-163

IN RE THE MATTER OF THE ESTATE OF
NELLIE MAY WILSON, DECEASED

ERMA JEAN PHIPPS,

Plaintiff

vs.

ROBERTA K. WILSON, Executrix of
the alleged Last Will and Testament
of the Deceased, Nellie May Wilson
ROBERTA K. WILSON,

Defendants

## ORDER OF DISMISSAL

The plaintiff, Erma Jean Phipps, having filed her Complaint To Contest The Will of Nellie May Wilson on December 27, 1991 and naming as defendants, Roberta K. Wilson, as Executrix and Roberta K. Wilson, individually, and the defendants having filed their Motion To Dismiss pursuant to Trial Rule 12 (B) (1) for the reason that the plaintiff filed her Complaint To Contest The Will beyond the five (5) month period of the order admitting the Will to probate which would require that the Complaint To Contest The Will be filed on or before the 11th day of May, 1991.

The plaintiff filed her Brief in Opposition To Defendants' Motion To Dismiss on March 5, 1992 and the defendants filed their Reply Brief In Support Of Defendants' Motion To Dismiss on March 12, 1992.

The Court set this matter for oral argument on the 8th day of May, 1992 and during said argument, the plaintiff filed the Affidavits of Hobart Chandler and Greg Gregory in support of plaintiff's position.

Counsel for the defendants objected to the filing of said Affidavits on the basis that same were not relevant, not timely filed, not subject to cross examination and expressed improper opinions and improper conclusions of law and moved to strike, and the Court took said motion under advisement.

The Court after considering its own records, the plaintiffs' Complaint, Defendants' Motion To Dismiss, Plaintiff's Brief In Opposition To Defendants' Motion To Dismiss and Defendants' Reply Brief, now finds that plaintiff's Complaint To Contest The Will should be dismissed as it was not timely filed within the five (5) month period required by Indiana statutes.

The Court further finds that the plaintiff's allegation of fraud was that the defendant exectrix failed to give notice to the plaintiff of the decedent's death; however, Indiana law did not require such notice and the alleged fraud was not the proximate or efficient cause of plaintiff's failure to timely commence her action against the Estate.

The Court further finds that the Affidavits of Hobart Chandler and Greg Gregory are not relevant, not timely filed and expressed improper opinions and conclusions of law and should be striken.

THEREFORE IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT that the Affidavits of Hobart Chandler and Greg Gregory, be, and hereby are, ordered striken from the record and that plaintiff's Complaint To Contest Decedent's Will be, and hereby is, ordered dismissed.

READ AND SIGNED IN OPEN COURT THIS 15 DAY OF JUNE, 1992.

/s/ FREDRICK SPENCER, JUDGE
MADISON CIRCUIT COURT

**FOR PUBLICATION**

| ATTORNEY FOR APPELLANT: | ATTORNEY FOR APPELLEE: |
|---|---|
| RICHARD F. DAVISSON<br>Davisson & Davisson, P.C.<br>Anderson, Indiana 46015 | JOHN E. EISELE<br>Schuyler, Eisele & Lockwood<br>Anderson, Indiana 46016 |

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**IN THE**
**COURT OF APPEALS OF INDIANA**
**FIFTH DISTRICT**

---

| | | |
|---|---|---|
| IN THE MATTER OF THE ESTATE OF<br>NELLIE MAY WILSON, DECEASED | ) | |
| ERMA JEAN PHIPPS, | ) | |
| Appellant-Petitioner | ) | |
| vs. | ) | No. 48A05-9209-CV-329 |
| ROBERTA K. WILSON, EXECUTRIX OF THE ALLEGED LAST WILL AND TESTAMENT OF THE DECEASED, NELLIE MAY WILSON; AND ROBERTA K. WILSON, | ) | |
| Appellee-Defendant | ) | |

---

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-9012-ES-163

---

BARTEAU, J.

Nellie May Wilson died testate on December 6, 1990, leaving all of her net estate, worth nearly $500,000, to Roberta Wilson ("Wilson"), her niece by marriage. Wilson was named as executrix of the estate. Nearly a year after the will was probated, Erma Jean Phipps, Nellie's natural niece, challenged the will, alleging that it was unduly executed, that it was obtained under duress and by fraud; and that the decedent was of unsound mind when the will was executed. The trial court granted Wilson's motion to dismiss Phipps' complaint because it was not filed within five months after the will was probated. Phipps appeals, raising the following issues:

I. Whether the trial court abused its discretion in quashing Phipps' subpoena to depose Wilson;
II. Whether the trial court erred by striking affidavits filed by Phipps in opposition to Wilson's motion to dismiss;
III. Whether the trial court erred in dismissing the will contest; and
IV. Whether Ind.Code 29-1-7-4 is unconstitutional.

We affirm.

## FACTS

On March 13, 1990, Robert Chandler, an investigator for Adult Protective Services, petitioned the Madison Superior Court for guardianship of Nellie's estate. The petition alleged that Nellie was unable to ~~care for her~~ financial affairs, that she suffered from periods of confusion and that she had poor short-term memory. Chandler estimated Nellie's estate to be worth about $300,000. Both Wilson and Phipps are listed on the petitioner [sic] as Nellie's nieces; however, Wilson is a niece by marriage and Phipps is Nellie's "natural" niece.[1] The petition for guardianship was supported by a letter from Dr. Begley, who stated that he examined Nellie and recommended that a guardian be appointed to handle her affairs. There is nothing in the record to indicate that a guardian was in fact appointed or that Nellie was found to be incompetent.

[1] It is not clear from the record whether Nellie had any other living relatives.

Nellie died on December 6, 1990. On December 11, 1990, Wilson petitioned for probate of Nellie's will and for the issuance of letters testamentary. Nellie's will was executed on March 16, 1990, three days after the petition for guardianship was filed. The court granted Wilson's petition on December 11.

Phipps filed her complaint challenging the will on December 27, 1991, over a year after the will had been probated. Wilson moved to dismiss the complaint for lack of subject-matter jurisdiction over the dispute. Before the hearing on Wilson's motion, Phipps subpoenaed Wilson to appear for deposition. Wilson moved to quash the subpoena and for a protective order preventing further attempts at discovery. The court granted Wilson's motion to quash, but took the request for a protective order under advisement. After a hearing, the court granted Wilson's motion to dismiss.

## DISCOVERY

Phipps argues that the trial court abused its discretion when it limited her ability to conduct pre-trial discovery. She argues that discovery was necessary to defend against Wilson's motion to dismiss. Wilson argues that the trial court did not abuse its discretion in quashing the subpoena.

Indiana Trial Rule 26(C) grants the trial court discretion to make any order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. The trial court has broad discretion in ruling on a motion for such an order, and this court will interfere with the trial court's order only if an abuse of discretion is shown. *Geib v. Estate of Geib* (1979), 182 Ind.App. 377, 395 N.E.2d 336, 338.

Phipps cites *Templin v. Erkekedis* (1949), 119 Ind.App. 171, 84 N.E.2d 728, a malpractice action, in support of her argument that she should have been permitted to conduct discovery in the manner she chose. In *Templin*, this court held the trial court abused its discretion in granting plaintiff's request for an order protecting her from a physical examination requested by the defendant doctor. According to the court, it was an abuse of discretion to deny the defendant the only means of disproving plaintiff's claims of malpractice. Here, however, Phipps does not argue that the only way to obtain the sought-after information is through a deposition. Phipps had other means of discovery available, *see* T.R. 26, none

of which she pursued. Therefore, we find no abuse of discretion. *See, Geib*, 182 Ind.App. 377, 395 N.E.2d 336.

## AFFIDAVITS

In support of her opposition to Wilson's motion to dismiss, Phipps submitted the affidavits of Hobart Chandler, an investigator for Adult Protective Services who filed the guardianship petition, and of Greg Gregory, an officer of Star Financial Bank. Chandler averred that he was informed that Nellie had been found wandering the streets of Anderson. According to Chandler, when he visited her in her home, Nellie did not know the day of the week and she was confused. (R. 164). Greg Gregory assisted Chandler in assessing Nellie's financial situation. He averred that when he talked to Nellie at her home, she was confused and had no idea of the value of her assets. The court granted Wilson's motion to strike the affidavits because they "are not relevant, not timely filed and expressed improper opinions and conclusions of law." (R. 178).

The trial court may use affidavits in order to determine the existence or non-existence of facts which would bring the action within the court's subject-matter jurisdiction. *Cooper v. County Board of Rev. of Grant County* (1971), 150 Ind.App. 232, 276 N.E.2d 533. However, we agree with the trial court that the affidavits were not relevant to the motion to dismiss. Wilson argued that the court lacked subject-matter jurisdiction because Phipps' complaint was filed over five months after the will had been admitted to probate. Phipps countered by arguing that this time period should be tolled because Wilson fraudulently failed to inform Phipps of Nellie's death. The affidavits—which were addressed to Nellie's state of mind—are not relevant to the issue of whether Wilson acted fraudulently.

## MOTION TO DISMISS

Phipps argues that the trial court erred in dismissing her complaint because Wilson's fraudulent actions tolled the running of the five-month period in which a will contest may be filed. Phipps alleges two instances of fraud: 1) Wilson's failure to notify Phipps, Nellie's only living blood relative, of Nellie's death; and 2) Wilson's fraud in inducing Nellie to leave her entire estate to Wilson.

Wilson argues that she was not required by law to give notice to Phipps; therefore, her inaction could not be considered fraud.

Pursuant to Ind. Code 29-1-7-17, any interested person may contest a will within five months after the date of the order admitting the will to probate. The right to contest a will is statutory, and if it is not exercised within the allotted time period, it is lost. *Matter of the Estate of Brown* (1992), Ind.App., 587 N.E.2d 686; *Estate of Niemiec v. Niemiec* (1982), Ind.App., 435 N.E.2d 999. The five month limit prescribed by the statute is jurisdictional. *Niemiec*, 435 N.E.2d at 1001. Generally, failure to file a will contest within the five months will result in dismissal. *Id.* Dismissal will not result, however, where a plaintiff has been induced to refrain from a timely filing by a fraudulent misrepresentation of the defendant. *Id.; Carrell v. Ellingwood* (1981), Ind.App., 423 N.E.2d 630. "The fraudulent conduct must have been the efficient cause of the failure to timely commence the action, and all the other elements entitling the plaintiff to equitable relief must be present." *Carrell*, 423 N.E.2d at 635. Thus, in order to defeat Wilson's motion to dismiss based on fraudulent conduct, Phipps had the burden to show Wilson acted fraudulently and that the fraudulent conduct was the cause of her failure to timely file the complaint.

The elements of actionable fraud are: 1) material misrepresentations of past or existing facts; 2) which misrepresentation is made with knowledge or reckless ignorance of the falsity; 3) which causes reliance to the detriment of the person relying. *Id.* Fraud may not be predicated on the nonperformance of acts which the defendant is not bound by law to do. *First Nat'l Bank of New Castle v. Acra* (1984), Ind.App., 462 N.E.2d 1345.

Indiana Code 29-1-7-5 provides, in relevant part:

> A petition for the probate of a will and for the issuance of letters testamentary or for the appointment of an administrator with the will annexed, or for the appointment of an administrator, shall state:
>
> (2) The name, age and place of residence of each heir, in the event the decedent left no will; *and the name, age and place of residence of each legatee and devisee, in the event the decedent left a will*, so far as such are known or can with reasonable diligence be ascertained by the personal representative;

(emphasis supplied). Under I.C. 29-1-7-7(b), the clerk of the court must then serve notice, by mail, of the estate administration to each heir, devisee, legatee, and known creditor "whose name and address is set forth in the petition for probate or letters."

Nellie left a will; therefore, Wilson was required to list only the legatees and devisees named in the will. Phipps is not a devisee or legatee of Nellie's will and Wilson was not required to list her in the petition for probate. Therefore, Wilson's failure to notify Phipps of Nellie's death cannot be considered fraudulent. *Acra*, 462 N.E.2d 1368. Further, there is no evidence that this alleged fraud was the proximate cause of Phipps' failure to timely file her complaint. In fact, Phipps admits that she was unable to file a complaint because of a serious illness and subsequent hospitalization.

Phipps also argues that Wilson committed fraud in inducing Nellie to leave her entire estate to Wilson. She alleges that Wilson induced Nellie to believe Wilson was the natural object of Nellie's bounty. Even if Wilson did commit fraud relating to the execution of the will, this allegedly fraudulent conduct is in no way related to Phipps' failure to timely file her complaint. *See Niemiec*, 435 N.E.2d at 1001.

## DUE PROCESS

Phipps argues that I.C. 29-1-7-4 is unconstitutional because it does not require notice to the decedent's heirs that the will has been admitted to probate. Phipps argues that she was entitled to notice because, as Nellie's only natural heir, she should have been able to contest the will. Further, she points out that her name and address were listed on the guardianship petition; therefore, Wilson and her attorney knew that Phipps was an heir. According to Phipps, because she did not receive notice, she was denied due process under the Fourteenth Amendment to the United States Constitution. Wilson argues that Phipps waived this issue by failing to comply with I.C. 34-4-10-11, which requires anyone seeking to have a statute declared void as unconstitutional must serve the Attorney General. Alternatively, Wilson argues that Phipps, who was not named in Nellie's will, was not entitled to notice and was not denied due process.

We will first address Wilson's waiver argument. I.C. 34-4-10-11, cited by Wilson in support of this argument is part of the Uni-

form Declaratory Judgment Act and is not intended to apply to other civil proceeding. *See State v. Black* (1978), 177 Ind.App. 588, 380 N.E.2d 1261. As Phipps does not seek declaratory judgment, she was not required to serve notice on the Attorney General before attacking the constitutionality of I.C. 29-1-7-4.

When faced with a challenge to the constitutionality of a statute, we presume the statute is constitutional. This presumption continues until clearly overcome by a showing to the contrary. *Miller v. State* (1987), Ind., 517 N.E.2d 64; *Garrod v. Garrod* (1992), Ind.App., 590 N.E.2d 163. Indiana Code 29-1-7-4 permits any interested person or a personal representative named in the will to petition the court 1) to have a will probated; 2) for the issuance of letters testamentary; 3) for the appointment of an administrator if no executor is named in the will; or 4) for the appointment of an administrator if the decedent died intestate. This statute also provides:

> No notice that a will is to be offered for probate or that it has been probated shall be required.
>
> No notice of the filing of, and hearing on, the petition described in this section shall be given to, or served, upon any person.

Phipps contends the "no notice" provision is unconstitutional.

We note that I.C. 29-1-7-4 is not the only notice provision in our probate code. As previously discussed, a petition for probate and for letters testamentary filed pursuant to I.C. 29-1-7-4 must include, among other things, the "name, age and place of residence of each heir, in the event the decedent left no will; and the name, age and place of residence of each legatee and devisee, in the event the decedent left a will, so far as such are known or can with reasonable diligence be ascertained by the personal representative." I.C. 29-1-7-5. As soon as letters testamentary or of administration have been issued, the clerk of the court must send notice to each heir, devisee, legatee and known creditor whose name and address are set forth in the petition. I.C. 29-1-7-7.

There is, however, no requirement in the probate code that notice be given to descendants, such as Phipps, who would be entitled to an intestate distribution but who have not been named in the will. Therein lies the rub. Phipps argues that because she would be

entitled to an intestate distribution if the will were set aside, her right to contest the will is a property interest protected by the Fourteenth Amendment to the United States Constitution. As such, she was entitled to notice before she was deprived of that interest by virtue of the tolling of the five-month limitation of I.C. 29-1-7-17.

The Fourteenth Amendment prohibits any state from depriving "any person of life, liberty, or property, without due process of law." Thus, one claiming a violation of due process must show 1) that there has been state action and 2) that a protected property interest is involved. *Board of Regents v. Roth* (1972), 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548; *Dunlap v. Cross* (1980), Ind.App., 403 N.E.2d 885.

The question of whether the state's involvement with nonclaim statutes, such as I.C. 29-1-7-17, is sufficient to implicate state action was addressed by the United States Supreme Court in *Tulsa Prof. Collec. Services, Inc. v. Pope* (1988), 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565. At issue in *Pope* was whether creditors of an estate, who made a claim against the estate after the time period for such had expired, were entitled to personal notice that the estate was being administered. According to the Court, state action occurs because the nonclaim statute of the probate code is operative only after there has been significant state involvement, in particular, an application to the court to admit the will to probate and an order admitting the will to probate. Thus, the state action, through the legal proceedings, triggers the start of the time in which the action must be brought. This involvement is significant and is sufficient state action to implicate the due process clause. *Id.*

The next question is whether Phipps has a protected property interest. She claims that her right to contest the will is a legally protected interest. Wilson argues that Phipps had only an expectancy interest, which is not entitled to constitutional protection. "Property interests, for the purpose of due process claims, are determined by reference to state law." *Lohorn v. Michal* (7th Cir. 1990), 913 F.2d 327. The property interest may arise from statute, ordinance or contract. *Dunlap*, 403 N.E.2d 885.

Phipps does not cite any authority to support her claim that her right to challenge the will is a protected property interest, nor do we

find any such authority.[2] Phipps has therefore failed to meet her burden of overcoming the presumption of constitutionality.

---

[2] Phipps does cite several cases from the United States Supreme Court in support of her argument; however, none of them are in point: In *Tulsa Prof. Collec. Serv. v. Pope* (1988), 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565, the Court held that known and reasonably ascertainable creditors of an estate are entitled to actual notice of the administration of the estate. In *Schroeder v. New York* (1962), 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255, the Court held that the petitioner was denied due process because she did not receive notice that her property was being condemned. Although she did not live on the property, her name and address were easily ascertainable from the county records. *Boddie v. Connecticut* (1971), 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113, holds that indigents may not be denied access to the courts to obtain a divorce based solely on their inability to pay court costs and fees. *Mullane v. Central Hanover Bank & Trust* (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, holds that known beneficiaries of trust funds were entitled to personal notice that the trustee sought judicial settlement of the trust accounts. The Court also held that notice by publication was sufficient to notify beneficiaries whose interest or whereabouts could not with due diligence be ascertained and as to those whose interests were conjectural or future. It should be noted that in all of these cases, the interest involved was a present, vested interest.

Phipps also cites the following cases from other jurisdictions: *Pallazzi v. Estate of Gardner* (1987), 32 Ohio St. 3d 169, 512 N.E.2d 971; *Smith by Young v. Estate of King* (1991), Miss., 579 So.2d 1250; *In re Estate of Barnes* (1973), 212 Dan. 502, 512 P.2d 387.

In *Palazzi* (1987), 32 Ohio St. 3d, 512 N.E.2d 971, the court stated *in dicta* that the "ability to contest the will clearly amounts to a 'legally protected interest' entitled to constitutional protection." *Id.* at _____, 512 N.E.2d at 974. However, the issue was whether a *named* beneficiary of the decedent's will who did not live in Ohio was entitled to personal notice. The court held that Pallazzi had no standing to attack the statute because he had failed to allege facts to show that he did not receive actual notice of the decedent's death.

*Smith by Young*, 579 So.2d 1250, involved intestate administration. The decedent's widow, the administratrix of the estate, neglected to inform the court that her late husband had a child born out of wedlock. The child sued the estate to have paternity established beyond the ninety-day period after the decedent's death in which paternity could be established. The court permitted the paternity action, opining that the child would be entitled to an intestate share and the administratrix, who knew of the existence of the child, had a duty to use reasonable diligence to inform the court of the potential heirs.

The facts in the *Estate of Barnes*, 212 Kan. 502, 512 P.2d 387, are somewhat similar to the facts here in that the decedent left his estate to non-relatives. However, unlike Indiana law, Kansas law requires the administrator to name all of the known "heirs at law," devisees and legatees, in the petition for probate. The administrator named two of the ten "heirs at law" in the petition along with the devisees. The administrator later informed the court of the names and addresses of some of the other relatives. The relatives who were not named complained, and

We note that throughout her argument, Phipps refers to herself as Nellie's "heir." In Indiana, an "heir" is defined as "those persons including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death intestate, *unless otherwise defined or limited by will.*" I.C. 29-1-1-3. Because Phipps was not named in the will, she is not an heir to Nellie's estate.

It has long been held in Indiana that the right to take property by devise and descent is a creature of statute. *Donaldson v. State* (1913), 182 Ind. 615, 101 N.E. 485. During the life of the decedent, the interest in the estate, for those who would take by intestate succession as well as those named in the will, is a mere expectancy interest, *Scott v. Scott* (1958), 238 Ind. 474, 150 N.E.2d 740, not entitled to constitutional protection. *Board of Regents v. Roth* (1972), 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548. The interest vests, if at all, at death, *Donaldson*, 182 Ind. 615, 101 N.E. 485, depending on whether, under the laws of this state, the person is entitled to a share in the estate. As already discussed, Phipps is not entitled to a share in the estate under Indiana law; therefore, she has no protected property interests for the purpose of her due process claim.

The decision of the trial court is AFFIRMED.

SHARPNACK, C.J. and CHEZEM, J. CONCUR

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(Footnote Continued)
the court held that *under Kansas* law the "known heirs at law" included only those heirs whose existence and whereabouts could be reasonable ascertained.

Supreme Court, U.S.
FILED
DEC 21 1993
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(2)

No. 93-691

In The

# Supreme Court of the United States

October Term, 1993

ERMA JEAN PHIPPS,

*Petitioner,*

v.

ROBERTA K. WILSON, INDIVIDUALLY AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF THE DECEASED, NELLIE MAY WILSON

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Indiana

## BRIEF FOR THE RESPONDENT IN OPPOSITION

JOHN E. EISELE
(Counsel of Record)
EISELE, LOCKWOOD & CHABRAJA
200 E. 11th Street, Suite 100
Anderson, Indiana 46016
(317) 643-3300

BRIAN J. MARTIN
BARNES & THORNBURG
1313 Merchants Bank Bldg.
11 South Meridian Street
Indianapolis, Indiana 46204
(317) 638-1313

*Attorneys for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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## QUESTION PRESENTED

Whether the Indiana Probate Code violates due process because it does not mandate that personal notice be given to every person who conceivably might want to contest the validity of a will admitted to probate even though those persons have no legally protected right to the assets of the estate.

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No. 93-691

In The

# Supreme Court of the United States

October Term, 1993

ERMA JEAN PHIPPS,

*Petitioner,*

v.

ROBERTA K. WILSON, INDIVIDUALLY AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF THE DECEASED, NELLIE MAY WILSON

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Indiana

## BRIEF FOR THE RESPONDENT IN OPPOSITION

## OPINION BELOW

The opinion of the Court of Appeals of Indiana (Pet. App. A3-A12) is reported at 610 N.E.2d 851. The order of the trial court (*Id.* at A1-A2) is not reported.

## JURISDICTION

The judgment of the Court of Appeals of Indiana was entered on March 10, 1993. A petition for transfer was denied by the Supreme Court of Indiana on August 2, 1993. This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

## STATUTES

The petition contains (Pet. 1-5) some pertinent Indiana statutes. In addition, Indiana Code Section 29-1-1-3 (definitions) provides in part:

> "Heirs" denotes those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death intestate, unless otherwise defined or limited by the will.

Indiana Code Section 29-1-7-5 provides in part:

> A petition for the probate of a will and for the issuance of letters testamentary or for the appointment of an administrator with the will annexed, or for the appointment of an administrator, shall state:
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> * * *
>
> (2) The name, age and place of residence of each heir, in the event the decedent left no will; and the name, age and place of residence of each legatee and devisee, in the event the decedent left a will, so far as such are known or can with reasonable diligence be ascertained by the personal representative.

## STATEMENT

1. Nellie May Wilson died on December 6, 1990, in Madison County, Indiana. Pet. App. A4. Nellie Wilson had executed her Last Will and Testament on March 16, 1990. *Id.* at A5. In that will, Nellie Wilson left all of her net estate to her niece by marriage, respondent Roberta

Wilson. *Id.* at A4. The will also named Roberta Wilson the executrix of the estate. *Ibid.* Roberta Wilson cared for Nellie Wilson during her life. *See* Ct. App. Br. of Wilson at 5 (citing record). On December 11, 1990, Roberta Wilson petitioned the Madison Circuit Court for probate of Nellie Wilson's will. Pet. App. at A5. On that date, the court granted the petition and admitted the will to probate. *Ibid.*

The Indiana Probate Code provides that a petition for probate must include the name and address "of each legatee and devisee, in the event the decedent left a will." Ind. Code § 29-1-7-5(2). That statute does not require the petition to list relatives who would have been entitled to an intestate distribution of estate assets if the decedent had not left a will. Pursuant to Ind. Code § 29-1-7-7, the clerk of the court must give notice of the administration of an estate by publishing such notice in a local newspaper and by mailing a notice to all persons listed in the petition for probate.[1] Here, the clerk complied with Indiana's probate code by twice publishing a notice in an Anderson, Indiana newspaper and by giving personal notice to Roberta Wilson – the only person named in the will. *See* Ct. App. Br. of Wilson at 6 (citing record).

On December 27, 1991, over a year after the will had been admitted to probate, petitioner Erma Phipps, a niece of Nellie Wilson, filed in the Madison Circuit Court a complaint contesting the validity of the will. Pet. App. A5. Roberta Wilson, acting as executrix of the estate,

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[1] That section of the Indiana Code also provides for personal notice to creditors – a matter not at issue in this case.

moved to dismiss that complaint as untimely under Ind. Code § 29-1-7-17. That section of the Indiana Probate Code provides that an action contesting a will must be brought "within five (5) months after the date of the order admitting the will to probate." On June 15, 1992, the Madison Circuit Court dismissed petitioner's complaint as untimely. Pet. App. A2.

2. In a unanimous opinion, the Court of Appeals of Indiana affirmed. Pet. App. A3-A12. The court stated that the five-month statutory period for bringing an action contesting a will "is jurisdictional" under Indiana law. *Id.* at A7. The court noted, however, that an action contesting a will is not barred by the statutory period if fraud caused the plaintiff not to meet the five-month deadline. *Ibid.* The court then rejected petitioner's contention that, under the facts of this case, Roberta Wilson acted fraudulently so as to cause petitioner not to meet the filing deadline. *Id.* at A8.

The court of appeals next addressed petitioner's claim that the Indiana Probate Code violates the Due Process Clause because it does not require personal notice to the relatives of the deceased if they are not named in the decedent's will. The court noted (Pet. App. A10) that the initial issue under the Due Process Clause is whether the petitioner was deprived of "property." And the court explained that the question of "property" rights is determined by state law. *Ibid.* The court of appeals then examined Indiana law and ruled that petitioner had no protected property right to the assets of Nellie Wilson's estate. Under Indiana law, a relative who might inherit through intestate succession never has a protected right to the assets of the estate if the decedent leaves a will that

does not name that relative as a beneficiary. *Id.* at A12 (citing Indiana cases). The court distinguished cases from other States where, under different facts and statutes, notice was required to certain persons interested in probate proceedings. *Id.* at A11 n.2. On August 2, 1993, the Supreme Court of Indiana declined to review the Court of Appeals' decision.

## ARGUMENT

The decision of the Court of Appeals of Indiana is correct and it does not conflict with the holding of any other court. Thus, no further review of this unique case is warranted.

1. The court of appeals correctly held (Pet. App. A10-A12) that petitioner was not deprived of any protected property right in a way that implicates the procedural safeguards of the Due Process Clause. This Court has often noted that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions defined by the existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth*, 408 U.S. 564 (1972). *Accord Lohorn v. Michal*, 913 F.2d 327, 336 (7th Cir. 1991) (property interests are created by state law). Petitioner suggests (Pet. 10) that she has a "property" interest in the assets of her aunt's estate. That contention, however, is wrong as a matter of Indiana law.

The Court of Appeals surveyed Indiana law and held (Pet. App. A10-A12) that petitioner never possessed a right to the assets of her aunt's estate. Under Indiana law,

"[n]o person has an inherent right to inherit property, and the lawmaking authority – the legislature – has the power to designate who shall inherit property." *Earle v. Indiana National Bank of Indianapolis*, 204 N.E.2d 652, 654 (Ind. 1965). Indiana's Probate Code provides that relatives who might otherwise inherit through intestate succession "may be disinherited" by a will. *Thacker v. Butler*, 184 N.E.2d 894, 896 (Ind. App. 1962). Thus, relatives who are disinherited by a will never "have a vested interest" pertaining to the assets of their relative – either during the relative's lifetime or at their death. *Thacker v. Butler*, 184 N.E.2d at 896. *Accord Scott v. Scott*, 150 N.E.2d 740, 742 (Ind. 1958).

Petitioner also suggests (Pet. 10) that she has a "property" interest by virtue of the Indiana statute (Ind. Code § 29-1-7-17) that creates a cause of action to contest the validity of a will. Even if that cause of action is "property," however, petitioner was not deprived of her "property" in a way that implicates the procedural safeguards of the Due Process Clause. Petitioner's own inaction – not the acts of the State – was the sole reason why petitioner lost any statutory right to contest the validity of Nellie Wilson's will. In such a case, the Due Process Clause does not require the State to provide personal notice or other procedural safeguards typically required when the State's actions cause the deprivation of "property."

This Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), is on point. That case involved an Indiana statute providing that unused mineral rights are forfeited if the owner of those rights does not record its property

interest within a certain time period. The owner of forfeited mineral rights argued that the Indiana statute violated due process because it did not provide property owners with individual notice of the statute and with notice of the duty to record unused mineral interests within a certain time period. This Court rejected that claim. The Court wrote: "The Due Process Clause does not require a [party] to notify a potential plaintiff that a statute of limitations is about to run." *Id.* at 536. The Court observed that the Indiana statute was "self-executing" in the sense that a party lost its property right through operation of the statute and the party's own inaction; no further state action was required. *Ibid.* The Court concluded: "[T]he State of Indiana has enacted a rule of law uniformly affecting all citizens that establishes the circumstances in which a property interest will lapse through the inaction of its owner. [There is no support for the proposition] that an individual must be given advance notice before such a rule of law may operate." *Id.* at 537.

The Court in *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), reaffirmed the holding of *Texaco, Inc. v. Short*. The Court noted that "due process does not require that potential plaintiffs be given notice of the impending expiration of a period of limitations." *Id.* at 486. The Court then explained its decision in *Texaco, Inc. v. Short*:

> The State's interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims. The State has no role to play beyond the enactment of the limitations period. While this enactment

> is obviously state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause.

*Id.* at 486-87.

The limitations period at issue in *Tulsa Professional Collection Services v. Pope*, however, was not self-executing. Under Oklahoma's probate scheme, creditors were deprived of their property by actions of the probate court. 485 U.S. at 487. The creditors had obtained their property rights outside of the context of probate proceedings – *e.g.*, accounts receivables or other legally enforceable claims. In probate, the creditors lost their property rights (without notice) by a series of actions of the probate court in combination with that State's nonclaim statute. *Ibid.* Accordingly, this Court held in *Pope* that there was substantial "state action" (*ibid.*) at work in the loss of the creditors' claims so that the procedural safeguards of the Due Process Clause were implicated.

In this case, by contrast, the State played no such role in the loss of petitioner's right to bring an action contesting Nellie Wilson's will. Petitioner's right to bring a legal action (the alleged "property") was created when Nellie Wilson's will was admitted to probate. *See* Ind. Code § 29-1-7-17. From that point in time, the State had no involvement in the loss of petitioner's "property." This case is thus exactly like *Texaco, Inc. v. Short* because petitioner lost her "property" right by her own "inaction" (454 U.S. at 537) in combination with the "self-executing" (*id.* at 536) five-month limitations period in Ind. Code § 29-1-7-17. Hence, as in *Texaco, Inc. v. Short*, the Due

Process Clause was not implicated and the State was not required to give personal notice to petitioner of the operation of Ind. Code § 29-1-7-17. *See* 454 U.S. at 537; *accord Tulsa Professional Collection Services v. Pope*, 485 U.S. at 487-87.

To hold otherwise would lead to absurd constitutional results. For example, Indiana has a Tort Claims Act that allows private parties to sue state entities. *See* Ind. Code § 34-4-16.5-1 *et seq.* Under Indiana law, the right to bring a tort action arises when the state actor commits a tort. At that point, the potential plaintiff has 180 days to give notice of his claim, and that limitations period is self-executing. *See* Ind. Code §§ 34-4-16.5-6 and -7. If petitioner's constitutional theory were correct, however, the State would be required to notify potential tort claimants of their right to bring lawsuits and of the 180-day limitations period. That is not the law.[2] *See Texaco, Inc. v. Short*, 454 U.S. at 536 ("Due Process Clause does not

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[2] Indeed, it would be impossible under petitioner's analysis to distinguish – for purposes of due process – *any* case involving application of a statute of limitations. All such cases involve the fact pattern presented here: the State creates a cause of action (such as a tort or civil-rights claim) and the State also limits that cause of action by a self-executing statute of limitations, *see, e.g.*, Ind. Code § 34-1-2-2 (various limitations periods for actions in Indiana). Under petitioner's theory, the State would somehow have to give personal notice in all cases before a court could use the statute of limitations to dismiss an action. Petitioner's analysis would also mean that state courts would be required to give notice of the 90-day period for filing a petition for certiorari with this Court after the state's highest court issues its judgment. Such notice clearly is not required by the Constitution.

require a [party] to notify a potential plaintiff that a statute of limitations is about to run"); *Tulsa Professional Collection Services v. Pope*, 485 U.S. at 486 (same). *Accord Martel v. Stafford*, 603 A.2d 345 (Vt. 1991) (Due Process Clause does not require probate court to give notice of statute of limitations to potential tort plaintiffs).

2. Even if petitioner had been deprived of "property" by the type of state action that implicates the procedural safeguards of the Due Process Clause, the Indiana Probate Code passes constitutional muster. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), this Court noted that a State has broad power to regulate a party's right to bring a legal action. The Court wrote: "The State may erect reasonable procedural requirements for triggering the right to an adjudication [such as] statutes of limitations." *Id.* at 437. The Court explained that "the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural . . . rule." *Ibid.* Thus, the due-process test for procedural restrictions on a cause of action is "reasonableness." The Indiana Probate Code passes that test.

Indiana's probate code provides notice that a will has been admitted to probate. The clerk of the court twice publishes notice of the administration of the estate in a local newspaper. *See* Ind. Code § 29-1-7-7(b). In addition, the clerk gives notice by mail to all parties named in the will and to all known creditors. Ind. Code § 29-1-7-7(c).[3]

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[3] If the decedent left no will, the clerk gives notice of the estate administration to all "heirs" – *i.e.*, those persons entitled to inherit through intestate succession. *See* Ind. Code §§ 29-1-1-3, 29-1-7-5(2), 29-1-7-7(c).

Accordingly, the administration of an estate in Indiana is a public event with personal notice given to the parties most interested in the estate.

To be sure, the Indiana Probate Code does not require personal notice to disinherited relatives if the decedent left a will. But it is reasonable to assume that, "[a]s a class," relatives who are close enough to the decedent to inherit through intestate succession will "be aware of [their relative's] death" within five months. *Tulsa Professional Collection Services v. Pope*, 485 U.S. at 489. Of course, there will be exceptions but the general assumption itself is a reasonable one. Furthermore, in certain cases, Indiana law permits parties to avoid the five-month limitations period in Ind. Code § 29-1-7-17. As the Court of Appeals noted below (Pet. App. A7), "fraudulent conduct" will excuse a parties' failure to file a will-contest action within the five-month period. There may be other justifications for a party's failure to meet the filing deadline, because the Indiana courts have long held that statutory limitations periods may be tolled by events not mentioned in the statute itself. *See Heckman v. Kassing*, 132 N.E. 379 (Ind. App. 1921).

Perhaps more important, the decisions of this Court make it plain that the Due Process Clause does not require personal notice to persons "whose interests are [] conjectural." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 317 (1950). The Court in *Tulsa Professional Collection Services v. Pope* reaffirmed that principle and wrote: "[I]t is reasonable to dispense with actual notice to those with mere 'conjectural' claims." 485 U.S. at 478. The term

"conjectural" accurately describes the interests of disinherited relatives such as petitioner. When a will is admitted to probate, there is no reason to believe that any particular relative will want to contest the validity of that will. Thus, the executor would have to "guess" about the relatives who might want to file a will-contest action. And if a relative does file such an action, the claim itself is "conjectural." This case illustrates that point. To prove her case, petitioner would have to overcome the facts that Nellie Wilson's will complies with the formal requirements of Indiana law and that her will was prepared with the assistance of a disinterested attorney. *See* Pet. 5.

In sum, the Indiana Probate Code's scheme is reasonable: All parties with concrete and immediate interests are given personal notice, and the rest of the community is given notice through publication. Family members who are not mentioned in a will are given at least five months to learn of the death of their relative.[4] There is no basis for this Court to invoke the Constitution to rewrite those reasonable provisions of Indiana law. *See generally United States v. Fox*, 94 U.S. 315 (1877) (States have plenary power to regulate disposition of assets of deceased).

3. The decision of the Court of Appeals does not conflict with the holding of any other reported decision. Petitioner cites (Pet. 10) cases from Oregon and Kansas for the proposition that relatives must be given actual notice of an estate's administration. Those cases, however, were not resolved on constitutional grounds. On the

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[4] Petitioner does not contend that the five-month period in Indiana law is so short as to violate due process.

contrary, Oregon and Kansas have statutes that require such notice to relatives. *See In re Estate of Barnes*, 512 P.2d 387, 391-92 (Kan. 1973); *Lawver v. Beesley*, 740 P.2d 1215, 1219 (Ore. App. 1987).

Petitioner also cites three cases (Pet. 7, 10) that involved parties who attempted to assert rights under prior wills. *See Garner v. Harrison*, 400 S.E.2d 925 (Ga. 1991); *Weidman v. Stahlhut*, 476 N.W.2d 357 (Iowa 1991), *cert. denied*, 112 S. Ct. 1596 (1992); *Palazzi v. Gardner*, 512 N.E.2d 971 (Ohio 1987). Those cases are distinguishable from this one on the ground that the prior wills in those cases created property rights that were later extinguished by actions of the probate court. In any event, the Ohio court in *Palazzi v. Gardner* ruled that the plaintiff's action was time-barred because the plaintiff had actual notice of the decedent's death; thus, the plaintiff could not contend that he was entitled to official notice from the court. *See* 512 N.E.2d at 977. And in *Garner v. Harrison*, the Georgia court ultimately rested its holding regarding notice to beneficiaries under prior wills on statutory grounds. *See* 400 S.E.2d at 927. In neither case did the court hold that the Due Process Clause requires personal notice of probate proceedings to relatives who might have inherited assets if the decedent had not left a will.

In *Weidman v. Stahlhut, supra*, the Iowa court did state in *dicta* that due process requires personal notice to relatives who would inherit through intestate succession. *See* 476 N.W.2d at 361. In that case, however, the Iowa court held that its decision would not apply retroactively. *Id.* at 363. Thus, the court affirmed the dismissal of the plaintiff's will-contest action. *Ibid.* Significantly, the Iowa court's constitutional analysis will have *no* future effect in

that State because the Iowa legislature has amended that State's probate code to provide for actual notice to relatives who would be entitled to inherit through intestate succession if the decedent left no will. *See* Iowa Code §§ 633.3 (definition of "heir"), 633.304. Thus, there is no reason for this Court to consider the correctness of the abstract due-process discussion in that case.

At bottom, therefore, a decision by the Court in this case would affect only one person – petitioner. Petitioner can cite no other case in any other State that would be affected by the Court's review of this case. And even in Indiana there is no reason to believe that petitioner's situation is likely to reoccur often. It is important to recall that a person is not entitled to official notice of the administration of an estate if he has actual notice of the decedent's death. *See Palazzi v. Gardner* 512 N.E.2d at 977; *Weidman v. Stahlhut*, 476 N.W.2d at 361 n.3. Thus, the facts that give rise to this case must be very uncommon – *i.e.*, petitioner claims she is close enough to the decedent to be entitled to the assets of the estate but she was unaware of the decedent's death for over a year.[5] Accordingly, no further review of petitioner's factually narrow claim is warranted.

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[5] We have been informed by a member of the Indiana Probate Code Study Commission that no one has ever asked the Commission to recommend a revision of the Indiana Probate Code so as to require personal notice to family members who are not named in a will. Thus, the issue presented by petitioner has not been an important topic in Indiana.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN E. EISELE
(Counsel of Record)
EISELE, LOCKWOOD & CHABRAJA
200 E. 11th Street, Suite 100
Anderson, Indiana 46016
(317) 643-3300

BRIAN J. MARTIN
BARNES & THORNBURG
1313 Merchants Bank Bldg.
11 South Meridian Street
Indianapolis, Indiana 46204
(317) 638-1313

*Attorneys for Respondent*

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